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STATE OF MICHIGAN

IN THE SUPREME COURT

DUSTIN ROCK,

Plaintiff-Appellee,

vs.

DR. K. THOMAS CROCKER and
DR. K. THOMAS CROCKER, D.O., P.C.,

Defendants- Appellants.

Supreme Court No. 150719

Court of Appeals No. 312885

Kent Circuit Court
Case No. 10-06307-NM

REPLY BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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RECEIVED by MSC 10/6/2015 1:31:21 PM

TABLE OF CONTENTS

RECEIVED by MSC 10/6/2015 1:31:21 PM

INDEX OF AUTHORITIES

Cases

Statutes

RECEIVED by MSC 10/6/2015 1:31:21 PM

Rules

RECEIVED by MSC 10/6/2015 1:31:21 PM

A. Alleged violations of the standard of care that a plaintiff's expert admits didn't cause the plaintiff's injury are irrelevant and must be excluded from trial.

Rock's weight-bearing and screw-and-plate placement claims are irrelevant to his remaining claim because, as he admits, there is no causal link between those two alleged errors and Rock's claimed damages. Rock tries to portray this issue as much ado about nothing. It's true that the Court of Appeals agreed that Rock can't seek damages for the weight-bearing and screw-and-plate placement claims. And it's true that Court of Appeals remanded for the trial court to revisit its ruling. But the panel quickly took away what it had given.

The Court of Appeals stated, in a footnote, that "**as the trial court noted**, whether defendant understood the proper use of the surgical plates and screws, and whether he understood when plaintiff could safely bear weight on his ankle, **is relevant** to his competency in treating this injury."[1] The trial court has also already stated a view consistent with the panel's analysis of the relevance of the testimony on those claims.[2] And the jurisprudentially significant issue for this Court persists: the evidence isn't and cannot ever be admissible, yet the Court of Appeals, in a published opinion, stated that "even if the violations did not directly cause plaintiff's eventual injury may be relevant to the jury's understanding of the case."[3] Rock's brief demonstrates the problem, arguing that alleged breaches that don't matter are "material" (i.e., "truly at issue in the

[1] Appx 118a, Court of Appeals Opinion , p. 9 n 8 (emphasis added).
[2] Appx 107a, Order regarding motions in limine, p. 2.
[3] Appx 118a, 120a, Court of Appeals Opinion, pp. 9, 11.

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case") and "probative."[4] This Court must dig that fishhook out of Michigan's jurisprudence.

Rock still hasn't cited a single case that endorses the admission of evidence on a meritless claim. Not one. He relies entirely on "a broad principle of admissibility" (citing only criminal cases) and declares that the jury "has a right" and "is entitled" to know about the alleged, yet non-injurious, breaches.[5] He fails, however, to offer any explanation of how the weight-bearing and screw-and-plate placement claims have any relevance. Perhaps Rock would say that a jury "has a right" or "is entitled" to know about a doctor's past success rate or prior medical-malpractice suits, but such evidence isn't admissible because it's irrelevant, confusing, and unfairly prejudicial. *Wlosinski v Cohn*, 269 Mich App 303, 311-312; 713 NW2d 16 (2005); *Persichini v William Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). The same is true for alleged standard-of-care violations that have no connection to the plaintiff's claimed damages.

Rock's reference to *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002) and the principle that the Michigan Rules of Evidence supersede the common law misses the mark. Dr. Crocker's argument is rooted in the existing rules of evidence. The other-acts evidence that Rock seeks to introduce doesn't make any fact of consequence more or less probable, MRE 401, 402, and it's unfairly prejudicial, confusing, and misleading for the jury, MRE 403. See also MRE 404(b). Dr. Crocker's brief certainly highlighted the fact that that the concept at issue has been acknowledged,

[4] Rock Brief, p. 9.
[5] Rock Brief, pp. 8, 9.

RECEIVED by MSC 10/6/2015 1:31:21 PM

endorsed, and followed in this state for over 100 years. But the point is that the rule hasn't changed: propensity evidence rests on a logical fallacy and, as such, it isn't relevant, it is unfairly prejudicial, and it is inadmissible. Neither Rock nor the Court of Appeals cited a single case to refute that point. In fact, Rock hasn't addressed unfair prejudice and jury confusion under MRE 403 at all.

Rock agrees that the weight-bearing and screw-and-plate placement claims have no place in the causal chain, i.e., one breach didn't cause the other or any damages. So, like the statistical evidence in *Wlosinski*, the weight-bearing and screw-and-plate placement claims would only divert the jury's attention from the claim at issue and focus it on the flawed logic of a propensity theory. Testimony on those claims cannot ever be admissible. Accordingly, this Court should reverse the Court of Appeals and hold that evidence relating to alleged violations of the standard of care that the plaintiff's expert admitted did not cause the plaintiff's injury are inadmissible.

B. MCL 600.2169(1)(a) states that when the defendant "is board certified, the expert witness must *be* a specialist who *is* board certified in that specialty." This Court should apply the statute as written.

For all of the parsing and text-twisting in the Court of Appeals' opinion and Rock's brief, the analysis is actually straightforward:

- A witness can't give expert standard-of-care testimony in a medical-malpractice case unless he meets the requirements of MCL 600.2169. *Grossman v Brown*, 470 Mich 593, 599; 685 NW2d 198 (2004).

- MCL 600.2169(1)(a) states that when the defendant "is board certified, the expert witness must be a specialist who is board certified in that specialty."

RECEIVED by MSC 10/6/2015 1:31:21 PM

- Dr. Crocker is board certified in orthopedic surgery.
- So Rock's "expert witness must be a specialist who is board certified in that specialty."
- But Rock's expert, Dr. Viviano, is not board certified in orthopedic surgery.
- Because Dr. Viviano is not board certified in the same specialty as Dr. Crocker, MCL 600.2169(1)(a) prohibits him from testifying regarding the standard of care. *Halloran v Bhan*, 470 Mich 572, 579; 683 NW2d 129 (2004).

The Court of Appeals contorted the statute to reach a different result in which "is board certified" means "was board certified." Rock excuses that contortion, stating that the statute was "poorly written to begin with."[6] Even if the Legislature could have done better when it comes to drafting the statute, that doesn't make the language at issue confusing or uncertain. Rather, the language would be confusing if the reader had to look for a case interpreting it to learn that, in this statute, "is" means "was." That's confusing. See *Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197, 216; 731 NW2d 41 (2007) ("[I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions."). As outlined above, Dr. Crocker's reading of the statute, in which "is" means "is," flows logically from the statutory language.

Like the Court of Appeals' opinion, Rock's analysis attempts to tether the board-certification requirement to the specialty requirement.[7] But this Court has already

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[6] Rock's Brief, p. 11.

[7] Recall that MCL 600.2169(1)(a) has three requirements: (1) **the licensing requirement**: the proposed expert can't testify unless he "is licensed as a health care professional …." (2) **the specialty requirement**: if the defendant is a specialist, the witness must be someone who "specializes at the time of the occurrence …," and (3) **the board-**

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explained that the board-certification requirement and the specialty requirement operate independently from each other, as indicated by "the use of the word 'however' to begin the second sentence." See *Halloran*, 470 Mich at 578-579 (explaining that "the second sentence imposes an additional requirement" that operates "'in spite of' the specialty requirement in the first sentence").

Rock also doesn't make any effort to address the last-antecedent rule that this Court discussed and applied in *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The specialty requirement is expressly oriented to the past with the phrase "at the time of the occurrence," while the board-certification requirement is not. Under the last-antecedent rule, the past-oriented phrase "at the time of the occurrence" only modifies the last antecedent, which, here, is "specializes." It doesn't reach into the next sentence, i.e., the board-certification requirement.

Rock's position appears to be that the Legislature mistakenly left "at the time of the occurrence" out of the board-certification requirement or it mistakenly separated the specialty requirement and the board-certification requirement with a period and the word "however." So Rock calls for what he terms an "insightful" and "realistic" reading of the statute.[8] But, as this Court has admonished, courts can't legislate or amend statutes through statutory construction. *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012).

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certification requirement: if the defendant is board certified, "the expert witness must be a specialist who is board certified in that specialty."

[8] Rock Brief, p. 11.

RECEIVED by MSC 10/6/2015 1:31:21 PM

Rock also tries to find support for his argument in the next subsection of the statute, MCL 600.2169(1)(b). But that subsection starts with the past-oriented phrase "during the year immediately preceding the date of the occurrence." *Id.* So, like the specialty requirement, subsection (b) is expressly past-oriented. Subsection (b) confirms that when the Legislature meant to orient a provision in MCL 600.2169 to the past, it used past-oriented phrases. There is no such phrase in the board-certification requirement.

Rock's continued reliance on *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004) is misplaced. *Shinholster* involved a different statute and different subject matter—the plaintiff's injury as opposed to expert qualifications. *Shinholster* doesn't stand for the proposition that all present-tense verbs in statutes refer to the past. Its analysis of an entirely different context has no bearing on the issue in this case.

Rock contends that if this Court reverses the Court of Appeals, it will need to revisit *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006). That isn't true. *Woodard* held that, under MCL 600.2169, "not **all** specialties and board certificates must match" because the witness can only "give testimony on the **appropriate** standard of practice or care." *Id.* at 558, 560. Emphasizing the meaning of "appropriate" in MCL 600.2169(1), this Court explained that the expert must match the defendant's specialty on "the one most relevant standard of practice or care":

> Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of

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> practice or care —the specialty engaged in by the defendant physician during the course of the alleged malpractice and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty. [*Id.* at 560.]

Rock's argument focuses on the use of the present tense in the specialty requirement and ignores *Woodard*'s emphasis of the word "appropriate." He also fails to appreciate the fact that the specialty requirement is expressly past oriented while the board-certification requirement isn't. Indeed, this Court echoed the present tense form of the board-certification requirement when paraphrasing it in *Woodard*. *Id.*

This case also won't affect *Woodard* because the "appropriate" standard of care doesn't depend on board certification. Indeed, MCL 600.2912a provides for two standards of care: (1) "general practitioners" are subject to the "general standard of care,"[9] and (2) "specialists" are subject to the "national standard of care."[10] *Cox v Bd of Hosp Mgrs*, 467 Mich 1, 17 n17; 651 NW2d 356 (2002). There is no third category for "board certified specialists." The reason for that is that board certification is a qualification, like being published or having a prestigious alma mater. Such qualifications don't change the standard of care. Presumably, the Legislature could have required the defendant and experts to have a similar number of publications, or to have received degrees from similarly ranked medical schools. Board certification, which

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[9] The general standard of care is "the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community …." MCL 600.2912a(1)(a).

[10] The national standard of care is ""the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances…."

RECEIVED by MSC 10/6/2015 1:31:21 PM

evinces an effort by the doctor to obtain and maintain credentials, is obviously a better choice. But an attempt to link board certification to the standard of care is no more valid that saying that doctors from the University of Michigan Medical School are held to a higher standard of care.

Woodard's analysis focused on ensuring that experts testify on the "'**appropriate** standard of practice or care.'" 476 Mich at 558-559, quoting MCL 600.2169(1). Both the standard-of-care statute, MCL 600.2912a, and the specialty requirement confirm that specialization affects the standard of care and the standard of care is judged from when the alleged malpractice occurred.[11] But board certification does not affect the appropriate standard of care, so it doesn't need to be and isn't tied to when the alleged malpractice occurred.

Rock also argues that there are "ridiculous results" that should deter this Court from reversing the Court of Appeals. But each "result" is easily debunked:

- **What if Dr. Crocker changes specialties?** Rock fears that his expert "would be required to 'match' Dr. Crocker's new specialty …."[12] But *Woodard* took care of this. Only the "appropriate" specialty is relevant. 476 Mich at 560. And, as discussed, this case won't affect *Woodard*'s analysis.

- **What if Dr. Crocker retires before trial?** Rock theorizes that "§2169(1)(a) would have no role whatsoever to play" because "Dr. Crocker would not **be** a specialist at the time the trial takes place."[13] Again, *Woodard* took care of this. Notably, Dr. Crocker's retirement may or may not affect his board certification. But if a defendant

[11] Under MCL 600.2912a, plaintiffs must prove that the defendant breached the standard of care based on "the state of the art **existing at the time of the alleged malpractice**." MCL 600.2912a(1) (emphasis added).

[12] Rock's Brief, p. 18.

[13] Rock's Brief, p. 18.

RECEIVED by MSC 10/6/2015 1:31:21 PM

loses his board certification for any reason before trial, the board-certification requirement becomes moot—the plaintiff's expert can be, but isn't required to be, board certified.

- **What if Dr. Crocker dies before trial?** Rock says that "Dr. Crocker's death would mean that he no longer is a specialist or board certified" and "the entirety of §2169(1)'s requirements for 'matching' experts would completely fall by the wayside."[14] Death is obviously possible. E.g., *Dawe v Dr. Reuven Bar-Levav & Assoc, PC*, 485 Mich 20; 780 NW 272 (2010). But death wouldn't affect the "appropriate standard of care," *Woodard*, 476 Mich at 560, and, if death is deemed to equate with the loss of board certification, the plaintiff is free to call a non-board-certified expert.

- **What if the plaintiff's expert dies after testifying in a *de bene esse* deposition?** Trial courts are fully capable of answering this question in an appropriate case. The issue apparently hasn't arisen since the board-certification requirement was added in 1993 (nor is it at issue here). It isn't so difficult an analysis that this Court should be deterred from interpreting the board-certification requirement as written.

- **What if Dr. Viviano became re-certified before the trial?** Then he can testify. If the basis for a pretrial ruling on a motion in limine changes, a trial court can certainly revisit the ruling. Again, trial courts are well equipped to handle these matters.

Rock's questions concerning pre-trial deaths and the lack of "complete assurance" before a trial starts are interesting and inevitable realities.[15] In fact, regardless how this Court interprets the board-certification requirement, the same issues could arise because the licensing requirement is indisputably a present-tense, day-of-testimony oriented provision. Under the licensing requirement, the proposed expert can't testify unless he "**is** licensed as a health care professional …." MCL 600.2169(1). As a result, the issues that Rock raises could always come up in the context

[14] Rock's Brief, p. 18.
[15] Rock's Brief, p. 20.

RECEIVED by MSC 10/6/2015 1:31:21 PM

of a witness who loses his license—whether due to death, retirement, or misconduct. Because an expert could lose his license the day before trial, this Court's interpretation of the board-certification requirement can't do anything to ease Rock's concern that "events can transpire at some point between the date of malpractice and trial that could dramatically affect who will be deemed qualified to testify under §2169(1)."[16] That's an unavoidable reality. But it's also the type of issue that trial courts can, do, and are well equipped to address.

In short, Rock's "ridiculous results" and fear of impacting *Woodard* are unfounded. The plain terms of MCL 600.2169(1)(a) focus the board-certification requirement on when the expert's testimony is being given. This Court should apply that language as written, reverse the Court of Appeals, and hold that, because Dr. Viviano is not board certified in the same specialty as Dr. Crocker, he is prohibited from testifying regarding the standard of care at trial.

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[16] Rock's Brief, p. 20.